PUBLIC JUSTICE, P.C.
AMERICA'S PUBLIC INTEREST LAW FIRM

February 27, 2015

Avi Garbow
General Counsel
Mail Code 2310A
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Proposed Changes to West Virginia's NPDES Program – Via SB166, SB 357, and Related Regulatory Revisions – That Will Weaken Clean Water Protections

Dear Mr. Garbow:

On behalf of the Advocates for a Safe Water System, Appalachian Mountain Advocates, Coal River Mountain Watch, Defenders of Wildlife, Earthjustice, Natural Resources Defense Council, Ohio Valley Environmental Coalition, Public Justice, Sierra Club, West Virginia Citizens Action Group, West Virginia Highlands Conservancy, West Virginia Rivers Coalition, and West Virginia Sustainable Business Council, we are writing to alert you to West Virginia's planned action to revise its NPDES program and undermine the fundamental requirement of the Clean Water Act—compliance with water quality standards. In response to pressure from the coal industry, the West Virginia legislature is now considering and is expected to take two related actions by the end of March that would remove the existing narrative condition in NPDES permits that requires coal mines to comply with those standards, and prohibit the West Virginia Department of Environmental Protection from incorporating such a provision in future permits.

If, as we expect, these revisions are enacted, they would constitute substantial revisions to West Virginia's NPDES program, and would therefore require EPA approval before they could become federally enforceable. 40 C.F.R. § 123.62. We believe EPA should disapprove these revisions. We also believe that these proposed revisions raise serious legal issues, and the potential for litigation involving EPA, that are appropriate for analysis and guidance from your office. We request a meeting to discuss this matter with you at your convenience.

The first legislative action proposed by West Virginia, SB 166, approves a regulatory change to the regulations governing the West Virginia NPDES program for coal mining that would eliminate a permit condition that requires discharges regulated by the permit to "be of such quality so as not to cause violation of applicable water quality standards." 47 C.S.R. § 30-5.1.f. This rule currently

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mandates that this requirement "shall be incorporated into the WV/NPDES permits either expressly or by reference," as a permit condition. *Id.*

The second legislative action is SB 357 (and its companion bill HB 2566), which would prohibit the incorporation of water quality standards "either expressly or by reference as effluent standards or limitations" into a NPDES permit issued in West Virginia. Through these actions, West Virginia plans to immunize the coal industry from its liability for impairing hundreds of streams in the state (see attached map), and to quash successful citizen enforcement of the existing requirement.

The proposed rule change and legislation are transparently aimed at relieving coal mine operators of any obligation to address ionic pollution – typically measured as conductivity – from coal mine valley fills. Each proposed provision targets the important narrative requirements contained in WVDEP's EPA-approved water quality standards, which, among other things, prohibit industrial or other wastes "in any of the waters of the state" that cause or contribute to "[m]aterials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life" or "[a]ny other condition . . . which adversely alters the integrity of the waters of the State," and which further provide that "no significant adverse impact to the chemical, physical, hydrologic, or biological component of aquatic ecosystems shall be allowed." 47 C.S.R. §§ 3.2.e, 3.2.i.

In 2011, EPA finalized a guidance document (approved by its Scientific Advisory Board) identifying ionic pollution from coal mines as a major source of harm to streams across Central Appalachia, and recommending a benchmark limit for conductivity. EPA, A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams (2011). Rather than set the recommended limits in NPDES permits for coal mines, West Virginia responded by issuing its own "Permitting Guidance for Surface Coal Mining Operations to Protect West Virginia's Narrative Water Quality Standards." That West Virginia guidance rejected EPA's recommended effluent limits on conductivity in favor of ineffective "best management practices." West Virginia also vigorously opposed a citizen challenge seeking to secure effluent limits on conductivity in a NPDES permit for a coal mine, eventually successfully overturning a ruling of its Environmental Quality Board on that issue in the state supreme court. *Sierra Club v. Patriot Min. Co.*, 2014 WL 2404299 (W. Va. 2014).

In other words, West Virginia has expressly rejected EPA's Benchmark, and refused to place any numerical limits in mining permits on discharges of ionic chemicals or conductivity. It does this notwithstanding the overwhelming science that suggests that every permitted in-stream outlet below a valley fill at a coal mine in West Virginia will cause biological impairment and violations of narrative water quality standards. The proposed rule change and legislation seek to foreclose the only remaining avenue to secure protections for streams from harmful ionic pollution – direct enforcement of the narrative water quality standards.

It would be unprecedented for EPA to allow West Virginia to change its permitting program to allow such widespread violations of the Clean Water Act. EPA's Benchmark establishes that when instream conductivity exceeds a level of 300 microSiemens per centimeter (μS/cm), there is a 59 percent likelihood of stream impairment (a violation of the narrative water quality standard) and at 500 μS/cm, there is a 72 percent likelihood. Benchmark at A-36. All of the peer-reviewed scientific studies published since EPA's Benchmark was issued have supported its findings. The adverse stream impacts of conductivity discharged from the mine outfalls below valley fills are unassailable.

Reviews of many hundreds of monitoring reports from those outfalls in central Appalachia show that the measured conductivity in the water being discharged generally exceeds 500 μS/cm. We are confident that EPA understands the implications of these facts. In fact, discharges from most in-stream outfalls exceed 1,000 μS/cm and many are in the 2,000 to 3,000 μS/cm range. There is no doubt, therefore, that every new Section 402 permit issued for surface mining in-stream treatment structures below valley fills will lead to a violation of the narrative water quality standard. The condition that West Virginia now seeks to remove from its program would have the effect of allowing all surface mines with valley fills in the State to violate the Clean Water Act and permanently degrade the State's streams with impunity.

This is not the first time that the West Virginia legislature has sought to defy federal law and protect the coal industry by weakening Clean Water Act protections. In 2012, the state legislature passed SB 615, which sought to modify the Clean Water Act's permit shield so that coal mines would be shielded from enforcement if they complied with numeric effluent limitations alone, even if they violated the narrative permit condition requiring compliance with water quality standards.

A federal court found SB 615 to be federally unenforceable. *OVEC v. Marfork Coal Co.*, 966 F. Supp. 2d 667 (S.D.W.Va. 2013). Also in 2012, in response to another recently-passed state law, the West Virginia Department of Environmental Protection (WVDEP) abandoned its established stream assessment methodology and refused to use that methodology to list biologically impaired streams on its § 303(d) list. In 2013, EPA's Region 3 Office disapproved that action, applied the state's established methodology, and restored those streams to the list.

After those actions were rebuffed, the same federal court twice held in citizen enforcement litigation that coal mines have violated the narrative permit condition in their NPDES permits by discharging high levels of ionic chemicals that have greatly increased stream conductivity and caused biological impairment. *OVEC v. Elk Run Coal Co.*, 24 F. Supp. 3d 532 (S.D.W.Va. 2014); *OVEC v. Fola Coal Co.*, 2015 WL 362643 (S.D.W.Va. 2015). In both cases, the court applied the same standard of impairment that EPA used in 2013 to restore streams to the 303(d) list. 24 F. Supp. 3d at 556; 2015 WL 362643 at *4 n.4. In addition, in both cases the court deferred to EPA and applied EPA's Benchmark for protecting stream life from harmful levels of conductivity. 24 F. Supp. 3d at 559 ("The Court will thus properly defer to EPA's

determination" in the Benchmark); 2015 WL 362643, at *8 ("the Court will continue to defer to the analysis and conclusions reached by the EPA"). Environmental plaintiffs have two additional citizen suits currently pending that seek to enforce the narrative water quality standards through the permit condition that is the subject of the proposed rule change and legislation. *OVEC v. Fola Coal Co.*, Civ. No. 2:15-1371 (S.D.W.Va.); *OVEC v. Fola Coal Co.*, Civ. No. 2:13-cv-21588 (S.D.W.Va.).

In defiance of the federal court rulings and EPA decisions, and in an effort to thwart additional citizen enforcement of the Clean Water Act, WVDEP and the mining industry are now urging the state legislature to remove the narrative permit condition from all NPDES permits for the coal mining industry. In its 2015 lobbying guide, the industry explained that this condition "has provided an opportunity for citizen's suits in federal court seeking CWA penalties for exceedances of water quality standards without corresponding NPDES effluent violations." West Virginia Coal Association, "WV Coal Legislative Program 2015" at 7. The pending legislative actions would immunize the industry from those violations, strip the narrative condition from all coal mining NPDES permits, and prohibit the inclusion of similar conditions in future permits.

EPA approved that narrative condition in 1985, when West Virginia consolidated its CWA and SMCRA authority over mining permittees in one division of a state agency. 50 Fed. Reg. 28202 (July 11, 1985). As a result, the CWA rule requiring compliance with water quality standards became consistent with the SMCRA rule that also requires compliance with water quality standards. "[T]he language concerning water quality standards was inserted into the final NPDES rules so that the final NPDES rules would comply with the state's surface mining regulations which were already in effect." *OVEC v. Fola Coal Co.*, 2013 WL 6709957, at *16 (S.D.W.Va. 2013); *see also Marfork*, 966 F. Supp. 2d at 683-84. Perversely, however, if the CWA rule is eliminated, a mining company may well attempt to escape the SMCRA rule as well, by contending that it is inoperative due to the CWA's permit shield and the SMCRA's savings clause, such that neither rule would apply. The Sixth Circuit recently acknowledged the close relationship between these provisions. *Sierra Club v. ICG Hazard, LLC,* 2015 WL 643382 (6th Cir. 2015) ("To hold, in connection with the very same selenium discharges, that ICG is in compliance with Kentucky water quality-based effluent limitations for purposes of the CWA but in violation of those same water quality standards under the Surface Mining Act would create an inconsistency or conflict in regulatory practice, in direct contravention of § 702(a)(3) [30 U.S.C. § 1292(a)(3)]."). Thus, the continued existence of the NPDES rule is important, if not necessary, to support the continued existence of the SMCRA rule. This means that approval by the Office of Surface Mining, Reclamation and Enforcement is also required before a change to the NPDES rule could take effect, because it could also be interpreted as changing the SMCRA rule. 30 C.F.R. § 732.17.

WVDEP and the industry will likely argue that there is no federal requirement that NPDES permits contain a narrative condition requiring compliance with water quality standards, and that

the only federal requirement is that the permit-issuer must establish effluent limitations for discharged pollutants that have a reasonable potential for violating water quality standards. 40 C.F.R. § 122.44(a), (d). However, the proposed changes would mean that coal mining permittees would *never* be subject to a narrative permit condition prohibiting them from causing or materially contributing to violations of water quality standards, even when there was insufficient data to support a numeric limit and a narrative permit condition was warranted. That would violate federal law, because it would remove WVDEP's discretion and/or duty to include such a condition to prevent a violation of water quality standards. *Id.*

Another reason why that argument does not support the proposed rule change is that WVDEP has never established any effluent limitations for any ionic chemicals in NPDES mining permits, and it has given no indication that it ever will, notwithstanding its knowledge that every permit that it issues for a large-scale surface mine with valley fills will lead to biological impairment and narrative water quality standards violations. The evidence of WVDEP's concerted efforts to avoid the implementation of narrative water quality standards is pervasive. WVDEP appealed an adverse ruling of reasonable potential in the *Patriot* case. It unsuccessfully sued to overturn EPA's Benchmark. *National Mining Ass'n v. McCarthy,* 758 F.3d 243 (D.C.Cir. 2014). It refused to identify conductivity as a cause of biological impairment in any impaired stream on its 303(d) list. It refused to adopt any TMDL relating to ionic chemicals or conductivity. It refused to apply its stream assessment methodology to biological impairment due to conductivity. As the court stated in *Elk Run,* this is an "abdication of responsibility by the WVDEP." 24 F. Supp. 3d at 549. "To credit the WVDEP's current position that there is no methodology for assessing West Virginia's biological narrative water quality standards . . . —leading to no enforcement whatsoever—would be to . . . fail to enforce the CWA." *Id.* And it is now seeking to undermine and evade two federal court rulings that, in reliance on EPA's own decisions, found that mines are violating water quality standards.

In these circumstances, there is no question that West Virginia has no intention of ever applying or enforcing its EPA-approved and federally-enforceable narrative water quality standards for biological impairment. 47 C.S.R. § 2-3.2.e and -3.2.i. Without any legitimate reasons, it is trying to eliminate an existing permit requirement requiring compliance with those standards. It does not deny that coal mines with valley fills are violating water quality standards. It does not deny that the existing requirement is necessary to prevent violations of water quality standards. On the contrary, it wants to delete the existing requirement precisely *because* there are known water quality violations and *because* citizen enforcement of those violations has been effective. West Virginia is engaged in a deliberate and sustained effort to prevent enforcement of federally-enforceable water quality standards because it wants to protect the mining industry while escaping both citizen enforcement and EPA oversight.

As a legal matter, EPA must not allow this to happen. West Virginia's repeated efforts to prevent the enforcement of narrative water quality standards establish that, if the permit condition requiring compliance with all water quality standards is eliminated, then permits for

coal mining facilities issued under the West Virginia NPDES program will no longer insure compliance with the Clean Water Act. The proposed legislative actions would eviscerate the CWA, and by the indirect application of the permit shield and SMCRA savings clause, potentially eviscerate SMCRA as well. West Virginia's water quality standards provide the "floor" for compliance with the CWA. 33 U.S.C. § 1311(b)(1)(C). WVDEP cannot enact regulations which allow NPDES permits to fall below that floor. *Id.* § 1370. Nor can it backslide from existing requirements and fall below that floor. *Id.* §§ 1342(o)(3) (anti-backsliding), 1313(d)(4) (anti-degradation). Yet that is exactly what WVDEP is proposing to do. It is trying to create a situation in which it is impossible to enforce compliance with narrative water quality standards in West Virginia.

We hope you will agree that this matter raises legal issues of exceptional importance to the enforcement of water quality standards under the CWA, and that EPA should not approve these changes. If EPA were to approve West Virginia's revision, it could lead to litigation of these issues involving EPA. In an effort to avoid that possibility, we would like to request a meeting to discuss this matter with you at your convenience.

Sincerely,

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